No. 3833

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

WILLIAM R. CASTLE, LORRIN A. THURSTON and ALFRED L. CASTLE, trustees under the will of JAMES BICKNELL CASTLE,

Plaintiffs in Error,

vs.

HAROLD K. L. CASTLE and the TERRITORY OF HAWAII,

Defendants in Error.

BRIEF FOR DEFENDANT IN ERROR, HAROLD K. L. CASTLE.

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BRIEF FOR DEFENDANT IN ERROR, HAROLD K. L. CASTLE.

This case comes up on a writ of error from the Supreme Court of the Territory of Hawaii issued on petition of the trustees of the Estate of J. B. Castle, deceased, and is solely concerned with the assessment of an inheritance tax on said estate under the local inheritance tax laws of the Territory of Hawaii. The Supreme Court held that said trustees must pay the inheritance tax and that, under the terms of the will, no part of it was payable by Harold K. L. Castle. This is the only feature of the case in which the present defendant in error, Harold K. L. Castle, is interested.

Statement of Facts.

The facts are succinctly stated in a stipulation in regard thereto signed by all the parties in interest (Record, pp. 1-4), but it will be wise to here briefly refer to them.

The testator's will (Record, pp. 5-21) is long and involved. After one specific devise to his wife of a piece of land, he left the residue of his estate to trustees, with the following directions (omitting certain minor provisions):

(a) To pay $1500.00 a month and "nothing less" to his widow, Julia White Castle, and to subsequently increase this, if practicable, to not over $40,000.00 per annum (Record, p. 8).

(b) Upon the decease of the widow, "to continue an income" to his son, H. K. L. Castle, "the *minimum* not to be less than five thousand dollars ($5000.00) per annum unless caused by financial embarrassment or inconvenience (of which the trustees shall be the absolute judges); the maximum not to exceed forty thousand dollars ($40,000.00) per annum * * *" (Record, p. 9).

(c) To accumulate land and capital to introduce into the Territory, if possible, a high class agricultural immigration of northern races, and, after fulfilling this and other requirements, to apply the balance of the income, and, after the death of his wife and son, the whole income to a certain educational purpose—namely, a co-educational boarding school devoted primarily to agriculture and domestic science (Record, pp. 9-16, 48-49; 25 Haw. at p. 119).

We do not pretend to exact accuracy in the above description, but it comes fairly close to expressing the testator's objects.

The widow elected to take by way of dower instead of under the will (Record, p. 2; see also *Castle v. Castle,* 267 Fed. 521) and the Supreme Court held this portion of the estate not taxable (Record, pp. 43-47) and there is no dispute on this point.

The widow's election to take dower accelerated the provision in favor of the son (Record, pp. 2, 49; see also *Castle v. Irwin,* 25 Haw. 786, 792), which also is not now disputed, and, by a compromise reached between him and the trustees (*Castle v. Irwin,* 25 Haw. 786, 787), the amount of his annuity has been capitalized and paid over to him. The only question as to him on this appeal is whether he must pay an inheritance tax of $4569.96, plus interest from October 8, 1919 (Record, p. 3).

The Decision of the Lower Court.

The actual final decision of the Supreme Court in this case is very brief (Record, pp. 60-61) and is based on a prior interlocutory decision (Id. 35-51). The court there held as follows:

(a) That a tax on the entire estate (not including the dower interest) was payable by the executors and trustees for the reason that the devise for educational purposes was not to be devoted to those purposes in the sense contemplated by the statute to entitle them to

exemption. In this decision the present defendant in error has no interest.

(b) That the annuity to the testator's son, H. K. L. Castle, was not subject to a tax to be paid out of said annuity, but that the tax was to be paid by the trustees out of the corpus of the residuary estate (Record, p. 37). On this subject, the court says:

> "At the hearing on appeal the attorney general has confessed error in the ruling of the circuit judge to the effect that the annuity to Harold K. L. Castle is subject to a tax to be paid out of said annuity. In this we concur and in line with the holding of Estate of Brown, 24. Haw. 443, hold that as the residuary clause of the will transfers the entire estate (with the exception of the estate known as Mahuilani on Haleakala, Maui, which is devised to Julia White Castle), to the executors and trustees, the inheritance tax (if any is due) must be paid by the executors and trustees out of the *corpus* of the estate."

Contentions of Defendant in Error, H. K. L. Castle.

We make three contentions in this case, any one of which, if sustained, is decisive in favor of H. K. L. Castle:

1. That the decision that H. K. L. Castle's annuity was not subject to a tax payable out of said annuity was in accordance with the intent of the testator, in accord with previous rulings of the Supreme Court and right on principle.

2. That the previous decision of the Supreme Court in *Estate of Brown,* 24 Haw. 443, settled the law on this subject in Hawaii; that that decision and the present decision involved the construction of a local territorial statute and that such construction should be deferred to by this court.

3. That the trustees appellant in this case are not interested in the subject in question and have no standing to prosecute an appeal and take the side of one beneficiary as against another and that the Supreme Court of Hawaii has expressly so held in this very matter on two separate occasions.

I.

THE DECISION OF THE SUPREME COURT OF HAWAII THAT H. K. L. CASTLE'S ANNUITY WAS NOT SUBJECT TO A TAX PAYABLE OUT OF SAID ANNUITY WAS IN ACCORDANCE WITH THE INTENT OF THE TESTATOR, IN ACCORD WITH PREVIOUS RULINGS OF SAID SUPREME COURT, AND WAS RIGHT ON PRINCIPLE.

It will be noted that no direct legacy was given to Harold K. L. Castle by the will of his father and that no *property* was *transferred* to him by said will. The entire estate with the exception of a piece of land on the Island of Maui, was devised and bequeathed to the executors and trustees in trust for a very considerable number of purposes. Among these purposes are several small annuities (Record, p. 8) and a provision for a payment of income to the widow (Id). Then comes

the provision for Harold K. L. Castle in the following language:

> "Upon the decease of my wife, Julia White Castle, I desire to continue an income to my son, H. K. L. Castle, subject to the following conditions: The minimum not to be less than five thousand dollars ($5000.00) per annum unless caused by financial embarrassment or inconvenience, (of which the Trustees shall be the absolute judges); the maximum not to exceed forty thousand dollars ($40,000.00) per annum, which forty thousand dollars ($40,000.00) shall include the income which he may be receiving from any property which I may give him prior to my decease, including the income from the one thousand (1000) shares of stock in Alexander & Baldwin, Limited, herein mentioned, together with that derived from property derived from his mother."
>
> (Record, p. 9)

In the said case of the *Estate of Brown,* 24 Haw. 443, the testator similarly transferred, that is, devised and bequeathed, all of his estate, except certain minor items, to his nephew, H. M. von Holt, provided, however, that certain monthly sums should be paid to two named relatives for their respective lives. In each case the testator transferred practically his entire estate to certain persons, charged with the payment of sums of income by the year or by the month to certain other persons. The court in that case held that:

> "The inheritance tax is payable upon the transfer of the residuary estate to respondent and not out of the monthly payments to be made to the petitioner."
>
> 24 Haw. 446.

The main reason was stated, as follows:

> "It should be borne in mind that the residuary clause transferred the estate, with the exception of the two small legacies mentioned, to the respondent, and by express provision makes the payment to the petitioner of the sum of one hundred dollars monthly a charge upon the estate so transferred to the respondent. Under our tax statutes, inheritance taxes are upon transfers in contemplation of death, and not upon the property transferred. (Authorities cited.) The transfer of the property out of which the monthly payments to the petitioner are to be made is to the respondent, and not to the petitioner."

Estate of Brown, 24 Haw. 443, 444-5.

The entire opinion of the court in the *Estate of Brown* might be incorporated in this brief as a part of our argument, so directly does it apply.

We submit that the will of James B. Castle, while not expressly providing that the income to be paid to Harold K. L. Castle should be free from any inheritance tax, clearly shows by implication that this is in accordance with the intention of the testator. James B. Castle did not give a fixed sum to his son, either in one cash payment or even from year to year. He provided that an income of a varying amount should be received by his son. He was looking at it from the point of view of how much his son should receive and not how much he (the testator) should give. If the will had worked out as the testator intended, and Mrs. Castle had taken thereunder instead of electing dower, the son would not have begun to receive any income until an indefinite time in the future and during an uncertain period, and even then the amount would have

been entirely uncertain from year to year, depending upon the discretion of the trustees *and the amount the son was receiving from certain other property.* There would be absolutely no basis upon which to figure the amount of the inheritance tax which the son should pay. It is highly unlikely that the testator had in his mind the possibility that the son would have to pay an inheritance tax on this indefinite interest. His thought was that the trust estate as the residuary estate should bear all the expenses and disbursements and that the first charge on the income should be certain sums to be paid to the widow and later to the son. It is true that the widow elected to take dower and that the income to the son has been capitalized and the agreed cash value thereof has been paid to him. But this has no bearing on the question whether the inheritance tax should be paid by the son or out of the residuary trust estate. This question should be examined as of the time of the death of the testator and as if no cash payment had been made to the son. It is a question arising under the statutes and decisions of the Hawaiian courts as applied to said particular will, and the decision should not be affected by the fact that there has been a considerable delay and change of circumstances since the tax became due as of the date of the death of the testator.

As the Supreme Court of Hawaii recognized, while Mr. Castle was deeply interested in the educational charity for which he made provision, his wife and son were still nearer his heart (Record, p. 48), and the charity was to receive only the "excess of income"

"after the fulfillment of the requirements upon the estate as above set forth" (Id. p. 41). His wife and son are the natural objects of the testator's bounty, and the language of the will and the order of priority established thereby clearly show that, in so far as their interests may conflict with those of the charity, they are to be preferred, and this expression of intention merely confirms what otherwise would be presumed in favor of an heir. The entire scheme of the will shows that Mr. Castle would wish the heavy burden of the inheritance tax to fall upon the residuary educational trust rather than on the provision made for his widow and son. We have in the will Mr. Castle's own statements as to the amount of income he expects and hopes his wife and son will *receive,* and we submit that his intention is clear that they are to receive this *net,* so far as the estate is concerned, that is, free from any burden connected with the estate either by way of inheritance tax or otherwise.

The authorities cited in the lower court by plaintiffs in error went largely to the point that the inheritance tax is not a tax upon property, which is the very point made by the Supreme Court in the quotation from the *Estate of Brown* heretofore referred to. Authorities from other States are of little assistance on this point, as the statutes generally differ so widely.

> "Many authorities have been cited to sustain the contention of respondent, but authorities, unless it appears that the cases decided were under similar statutory and testamentary provisions, are of no assistance here."
>
> *Estate of Brown,* 24 Haw. 446.

The court will also observe that the Honorable Attorney General of the Territory of Hawaii realized so fully that the annuity to Harold K. L. Castle could not be held subject to a territorial inheritance tax to be paid by him out of said annuity that, on the appeal from the decision of the trial court assessing such a tax, he not only did not attempt to argue the point, but *confessed error* (Record, p. 37). It should also be noticed that the Supreme Court did not merely decline to consider the point and give a pro forma decision thereon, but that it expressly concurred in the stand taken by the Attorney General and gave its reasons therefor (Id.).

We submit therefore, as stated in this heading, that the decision now appealed from was not only in accordance with prior Hawaiian decisions, but was in consonance with the intent of the testator and was right on principle. Even if, however, we are wrong in this, there are other principles which necessitate an affirmance of the decree.

II.

THE PREVIOUS DECISION OF THE SUPREME COURT OF HAWAII IN ESTATE OF BROWN, 24 HAW. 443, SETTLED THE LAW ON THE SUBJECT IN HAWAII; THAT THAT DECISION AND THE PRESENT ONE INVOLVED THE CONSTRUCTION OF A LOCAL TERRITORIAL STATUTE AND THAT SUCH CONSTRUCTION SHOULD BE DEFERRED TO BY THIS COURT. HEREIN ALSO OF THE CONTENTION BASED ON THE AMENDMENT OF THE TERRITORIAL INHERITANCE TAX LAW IN 1917.

As has already been pointed out, the case of *Estate of Brown,* 24 Haw. 443, absolutely settles the principle

that, in Hawaii, when property is devised or bequeathed to one with a charge that he pay out of it to another a sum in the nature of an annuity, the local territorial inheritance tax is chargeable against the devisee and not the annuitant. That rule was followed in the case at bar on two separate occasions in the progress of the case (Record, pp. 35, 60) and it was therefore held that no tax was payable by Harold K. L. Castle. Every reason of policy calls for the following of these decisions on this appeal. It is quite true that a federal court is not absolutely bound by a decision of a territorial court construing territorial laws in the same way as it is bound by a decision of a state court in construing state laws. Nevertheless, the difference is simply one of degree, and very great weight is given to the decisions of even ordinary territorial courts, where local laws are in question.

This is well illustrated by the case of *Copper Queen Consolidated Mining Co. v. Territorial Board of Equalization of the Territory of Arizona,* 206 U. S. 474; 51 L. Ed. 1143. In that case the legislature of Arizona enacted a law which had been previously enacted by the State of Colorado. When the Act came under consideration in the court, however, the Supreme Court of the Territory of Arizona refused to construe the Act as it had been previously construed by the Supreme Court of the State of Colorado in spite of the well known principle that, where a law of one jurisdiction is enacted in another jurisdiction, the construction given said Act in the former jurisdiction will usually be followed. The Supreme Court of the United States affirmed the judg-

ment of the Arizona court upon the ground that it was a construction of a local statute to which the United States Supreme Court would naturally lean, whether its own opinion was otherwise or not.

We contend that the rule applicable to territorial courts in general should be even more strictly adhered to in the case of appeals from the Supreme Court of the Territory of Hawaii. It must be remembered in this connection that Hawaii has a civilization older than that of many of the states of the Union. The first volume of Hawaiian Reports was published in 1857 and covered decisions for a period of ten years prior to that time. By the time the Islands were annexed to the United States a complete system of jurisprudence had grown up, which placed Hawaii in a very different position from newly organized territories of the United States. Congress recognized this distinction in passing the Organic Act for the government of the Territory of Hawaii, and it nowhere more fully recognized it than in Section 86 of said act, which provided in part as follows:

> "The laws of the United States relating to appeals, writs of error, removal of causes and other matters and proceedings as between the courts of the United States and the courts of the several states shall govern in such matters and proceedings as between the courts of the United States and the courts of the Territory of Hawaii."

This law was changed in only one respect by the amendment of the Organic Act in 1905, and that was by providing that writs of error and appeals might be taken to the United States Supreme Court where the

amount involved exceeded the sum of five thousand dollars. This provision was very recently changed so as to confer appellate jurisdiction on this court instead of the Supreme Court of the United States. It is readily apparent, therefore, that considerable distinction should be made between the decisions of the Supreme Court of the Territory of Hawaii and the decisions of ordinary territorial courts. It is also readily apparent that the present case is before this court *not because any provision of the Inheritance Tax Act, a purely local law, is involved,* but simply because the amount involved is more than five thousand dollars.

We now desire to refer to a number of decisions of the United States Supreme Court, passing on decisions of the Supreme Court of Hawaii. The first of these is the case of *Kealoha v. Castle,* 210 U. S. 149; 52 L. Ed. 998. In that case the Hawaiian Supreme Court held, following an earlier decision, that a law legitimating children born out of wedlock upon the marriage of their parents was not applicable to the issue of an adulterous relation. As will be observed from a reading of the cases, the previous Hawaiian decision on this point was in conflict with the decisions of practically all the states of the Union. Nevertheless the United States Supreme Court held that it was a matter of local law, and that the decision of the court on the spot should be followed.

The next case is that of *Cotton v. Hawaii,* 211 U. S. 162; 53 L. Ed. 131. This case involved the question of what constituted a final judgment in the Territory of Hawaii and the United States Supreme Court, in fol-

lowing a Hawaiian decision which was promulgated a considerable time after a right of appeal to the Supreme Court of the United States had been given, said inter alia:

> "The statutes, it will be observed, confer no express power upon the Supreme Court of the territory to enter a final judgment in a cause upon the overruling of exceptions, and, indeed, that the Supreme Court of the territory does not construe the territorial statutes as giving it such authority, and, therefore, that the court could not have intended to exert such power in this case, so conclusively appears from recent decisions of the Supreme Court of Hawaii as to leave the question *not open to controversy.*"

Later, in the same opinion, the Supreme Court of the United States expressly points out that it is applying the construction given by the Supreme Court of Hawaii to the local statutes of that territory.

We will refer next to the two Atcherly cases. In the first of these, *Lewers & Cooke v. Atcherly,* 222 U. S. 285; 56 L. Ed. 202, the court held that it would follow the decision of the Hawaiian Supreme Court to the effect that a judgment of the Land Commission of Hawaii could not be attacked except by a direct appeal to the Supreme Court of the territory, as provided by law. In its opinion in this case the Supreme Court of the United States points out very forcibly the great weight which should be given to the opinion of the court upon the spot in construing local laws, and also points out the special reasons for following this course in the case of the courts of Hawaii.

The same question which was involved in the above case came again before the Supreme Court of Hawaii in the case of *Kapiolani Estate v. Atcherly,* 21 Haw. 441. In that case the Supreme Court of the territory came to the conclusion that its previous decision in the case of *Lewers & Cooke v. Atcherly,* which had been affirmed by the United States Supreme Court, was erroneous, and that, as a matter of fact, the plaintiff was entitled to go behind the judgment of the Land Commission referred to in that case. The Supreme Court of Hawaii stated that it would reverse its previous decision, therefore, except for the fact that it was bound by the affirmance of that decision by the Supreme Court of the United States, using in part the following language:

> "It makes no difference that in making that decision the Supreme Court followed the opinion of this court upon a matter of *local law,* and that we now believe that that opinion was not well founded. If the former ruling is to be reversed, the reversal is to be made by that court, and not this. The most that we can do now is to respectfully point out wherein, in our judgment, the former opinion was wrong. This we have done, believing it was our duty to do it, and with this our duty in the premises ends."

This case was also taken to the United States Supreme Court, which held that, as the Hawaiian Supreme Court now took a different view of the effect of the Land Commission award in question, it would follow such new view, even though contrary to its previous decision, and, therefore, it reversed the decision of the Hawaiian Supreme Court and ordered that judgment be entered in the way said court had held the

same should have been entered, if it had not been bound by the earlier decision of the Supreme Court of the United States (238 U. S. 119; 59 L. Ed. 1229).

The next case to which attention is called is the case of *John Ii Estate v. Brown,* 235 U. S. 342; 59 L. Ed. 259. In that case the construction given by the Supreme Court of the Territory of Hawaii to a will written in the Hawaiian language was sustained as against the construction given by the federal court of the territory and affirmed by *this* court, and yet, from an examination of the will in question, it is very apparent that the construction given it by the Hawaiian Supreme Court was clearly wrong, and the construction by the federal courts in question was as clearly right.

In the case of *Halawa Plantation v. County of Hawaii,* 22 Haw. 753, the Supreme Court of Hawaii decided that, under the Hawaiian County Act, counties were not liable for the torts of their employees. This was a marked departure from the general rule of the various state courts, but, in affirming that decision, *this* court said:

> "The construction which the Supreme Court of the territory has put upon the local statutes pertaining to county organization and to powers and liabilities of counties in the territory is entitled to great weight. This is especially pertinent in the present case, because the Legislature of Hawaii with knowledge of the judicial construction adopted by the Matsumura decision has met in four sessions since the court declared the law, and although it has amended the county act in several other respects, it has failed to change the law as announced in that opinion and decision. Revised Laws of Hawaii 1915, Secs. 1503, 1507-1517, 1527, 1531, 1554,

1565, 1573; McChesney v. Hagar (Ky.) 104 S. W. 714."

Hawaii County v. Halawa Plantation, 239 Fed. 836, at p. 839.

It is true that in *Castle v. Castle,* 267 Fed. 524, this court held that, in passing on a question of dower which was "very broad" and of a "general nature", it would not follow the Hawaiian Supreme Court (when that court was clearly wrong). The same can hardly be said, however, of the Hawaiian inheritance tax law and, moreover, there was no *prior* decision involved in that case as there is in this one. Dower statutes date from very early times, but inheritance tax laws are new and constantly changing and no two of such laws are exactly alike.

Counsel for the trustees pointed out in the lower court that the Hawaiian inheritance tax law was amended by Act 223, Session Laws of 1917, after the death of Cecil Brown, the testator in the case of *Estate of Brown,* supra, and that, by reason of said amendment, the decision in that case is not applicable. It would seem a sufficient answer to this argument that, when the decision in question was rendered, the amendment was in force and that no comment was made on it, but we can go much farther than this. The amendment was of Section 1323 of the Revised Laws of Hawaii (1915). This section as originally enacted and *as re-enacted in the amendment* provided for inheritance taxes on all property passing by will. So far as pertinent, it reads as follows:

"All property which shall pass by will * * * to any person or persons * * * in trust or other-

> wise, or by reason whereof any person * * * shall become beneficially entitled * * * to any property or to the income thereof, shall be and is subject to the tax hereinafter provided for * * * ''

The law as originally enacted provided for uniform rates of 2% for near relatives and 5% for all others. The sole purpose of the amendment, as will be plainly seen by reading it, was to fix *new rates* and *not* to change *the substantive law.* In creating these *new* rates for contingent or conditional estates in trust, the amendment further provided that

> ''a tax shall be imposed upon said transfer *at the highest rate* which on the happening of any of said contingencies or conditions, would be possible under the provisions of this Act, and such tax so imposed shall be due and payable forthwith by the executors and trustees out of the property transferred.''

This amendment does not purport to make, and does not make, any substantive change of the law as to what interests or estates are taxable or from what funds taxes are to be paid. Surely the legislature, if it had intended to make such an important change as that claimed by plaintiffs in error, would have covered the matter more clearly and fully and would not have left the change to be implied or inferred. Furthermore, the amendment says that the tax shall be payable ''out of the property *transferred''* and the very point on which both the opinion in the *Estate of Brown* and the opinion in the *Estate of Castle* are based is that in *each* case the will *transferred* the *entire* estate to someone other than the annuitant, that is, to H. M. von Holt, residuary legatee in the former case and to the trustees in the latter case. Finally, the amendment in question was in

full force and effect when *this case* was decided (not being mentioned in the opinion because it deserved no mention) and the rule as to following local law applies almost as strongly to following that decision as to following the decision in *Estate of Brown.* To overturn *both* decisions, however, on a matter of local law, would be unusual if not unprecedented (see *Ii Estate v. Brown,* supra; *Kealoha v. Castle,* supra; *Hawaii County v. Halawa Plantation,* supra).

In view of the decisions of the United States Supreme Court heretofore cited, we submit that this court will unhesitatingly follow the ruling in *Estate of Brown,* supra, and the similar ruling, *twice* made, in *this* case. We also submit that to reverse the decisions of local courts on matters of local law in a case which has come to this court, *not* because such local law is involved, but simply because there is over five thousand dollars in controversy (and just barely that in this case so far as H. K. L. Castle is concerned), would be to create an extremely bad precedent. We therefore respectfully submit that these decisions should be accorded controlling weight on this appeal.

III.

THE TRUSTEES APPELLANT IN THIS CASE HAVE NO STANDING TO PROSECUTE THIS APPEAL AND TAKE THE SIDE OF ONE BENEFICIARY AS AGAINST ANOTHER AND THE SUPREME COURT OF HAWAII HAS EXPRESSLY SO HELD IN THIS VERY CASE ON TWO SEPARATE OCCASIONS.

When a case is appealed to this court from the Supreme Court of the Territory of Hawaii, one would

naturally expect that a *complete* record of the proceedings in the case would be sent up. This has not been done in this case and two *very* important decisions of the court are omitted from the record. We make no technical point in regard to this, however, and, as the decisions in question are fully reported, the omission is of little importance. We are convinced that the plaintiffs in error are acting in entire good faith, but we are also convinced that, in demanding that Harold K. L. Castle pay a tax on his interest in the estate, it is difficult to explain their attitude. We shall quote from the decisions in question without comment.

In *Castle v. Irwin,* 25 Haw. 786, 789-790, the court said:

> "Counsel for the trustees have moved the court for permission to perfect their appeal and have filed a motion for the issuance of a writ of certiorari directing the clerk of the court below to transmit here 'the appeal and notice of appeal of said petitioners filed in said circuit court November 26th, 1920'. Mr. Withington, of counsel for the trustees, stated at the outset of his argument that the trustees had not appealed from the decree of the court below *because their position being neutral they had no appealable interest in the controversy.* While not deciding the question we are free to say that there appears to be much force in counsel's position for it is the general rule that executors, administrators and trustees are in their official capacity indifferent persons as between the real parties in interest. The funds which come into their hands are held in *custodia legis* to be distributed by the court to those who show themselves entitled to them and it is their duty to distribute the money coming into their hands as the court shall direct. Applying this rule to an executor who attempted to appeal from the decree of the superior court the

supreme court of California in *Estate of Marrey,* 65 Cal. 287, speaking through Mr. Justice McKinstry, said: 'The appeal of the executor from the decree of settlement and disposition must be dismissed. He cannot in any case litigate the claim of one legatee as against the others at the expense of the estate'. In the present case all the beneficiaries under the will except Titus M. Coan are satisfied with the decree of the court below, and the right of the trustees to prosecute an appeal at the expense of the estate is, to say the least, doubtful. See also *Bryant v. Thompson,* 128 N. Y. App. 426. In the New York case the trustees under the will of Francis W. Tracy brought an action for the construction of the will and asked the court to determine which of two parties was entitled to certain funds in plaintiffs' hands as trustees. The judgment rendered decided the question and this was acquiesced in by both of the alleged claimants to the funds who were parties and were of age. The court held that under the law of New York the right to appeal is limited to a party aggrieved and as plaintiffs were not aggrieved by the judgment they were not entitled to appeal.

The supreme court of Hawaii in *Haw'n Trust Co. v. Holt,* 24 Haw. 212, recognized and applied the well known rule to the effect that a party to a suit cannot appeal from a judgment or decree if he is not thereby affected. See also *Virden v. Hubbard,* 37 Colo. 37; *Goldtree v. Thompson,* 83 Cal. 420. It is true that our local supreme court in *Haw'n Trust Co. v. Galbraith,* 22 Haw. 78, sanctioned the right of the trustees to appeal, but in that case the trustees had a personal pecuniary interest in the decree of the court from which the appeal was taken."

In a decision on a petition for a rehearing in the same case, 25 Haw. 807, 810-812, the court further said:

"But aside from these questions there is a fundamental principle of law which is a complete bar to the granting of this application for a rehearing as

well as to the recognition of any right of the trustees to have a review of the decree of the court below by a writ of error or otherwise. It is a principle of appellate procedure which runs in a true course through all the text books, reports and statutes. It is referred to in our former opinion and is to the effect that the appellate jurisdiction of this court, can only be invoked by a party aggrieved by the decision, judgment, order or decree of the court below. See *McCandless v. Pratt,* 211 U. S. 437, and authorities cited in the former opinion in this cause. The same principle is recognized in Act 45 supra in the following language: 'In case the decision, judgment, order or decree sought to be reviewed was rendered *against* two or more persons * * * all such cases shall be determined as if *all such persons* had joined in the appeal.' The decree in this case which Coan has brought here for review was not rendered against, nor does it affect, the trustees. They brought their bill in equity in the court below to obtain a construction of the will of James B. Castle, deceased, and to have a confirmation and approval of a compromise agreement which they had entered into with Harold K. L. Castle, a son of the deceased and one of the legatees named in the will. The court below entered a decree construing the will as requested, and in conformity with the former opinion of this court and also approved the compromise agreement between the trustees and Harold K. L. Castle in one of the alternate amounts agreed upon between them. From this decree Coan has perfected an appeal which has been disposed of by an affirmance of the decree of the lower court. Neither the trustees, Harold K. L. Castle, nor the attorney general, representing the public charity, have appealed. Harold K. L. Castle is satisfied with the decree below and so is the attorney general, *who in fact represents the only interest which might claim to be substantially aggrieved by the decree of the court below. The trustees are not affected one way or the other. It should be no concern of theirs whether that portion*

of the funds of the estate in question be given to the son of the deceased or devoted to the purpose of the boarding school contemplated in the will. Both of these interests are represented by able and competent counsel who are fully qualified to protect the interests which they respectively represent and they have acquiesced in the decree below. *The trustees should occupy a neutral and indifferent attitude in any controversy between the real parties in interest and clearly they ought not to be allowed to litigate the claim of one such interested party as against another such party.* If the estate itself as an entity is attacked it would be the duty of the trustees to defend and if such defense requires that an appeal be prosecuted it would then be the duty of the trustees and they would have the undoubted right to prosecute an appeal. So if the interest of the estate require the bringing of a suit such suit should be brought in the name of the trustees and in the event of an unfavorable judgment or order the trustees should appeal therefrom if such appeal would be proper to protect the interests of the estate. But beyond this neither their duty nor their rights will permit them to go. With controversies which affect the individual interests alone of those who may be interested in their trust they have nothing to do and consequently cannot be aggrieved by a decree which affects those individual interests. See *Goldtree v. Thompson,* 83 Cal. 420."

Although these decisions were rendered in regard to an attack by the trustees on the acceleration of Harold K. L. Castle's interest in the estate (which they no longer dispute), it is difficult to distinguish them in their bearing on the present dispute, wherein the trustees claim that Harold K. L. Castle should pay the inheritance tax on his annuity in order to prevent such tax from falling on *other* interests.

We leave it to *this* court to say whether, in view of the above and in view of the previous admissions of the trustees that they were "neutral" and had "no appealable interest in the controversy" and in view of the fact that "the attorney general, representing the public charity * * * who in fact represents the only interest which might be claimed to be substantially aggrieved" makes no complaint, the plaintiffs in error should be allowed to attack the decree now under review so far as it affects the interests of Harold K. L. Castle. We present no argument on the point other than the decisions above noted, we make no contention that the record on appeal is incomplete and we leave it to the court to say whether the trustees are, under the circumstances, entitled to *now* claim a payment of $4,569.96 and interest from our client, both in view of their past attitude and in view of their lack of interest in the subject matter of the litigation.

IV.

REPLY TO BRIEF OF PLAINTIFFS IN ERROR.

The foregoing part of this brief was written before receipt of the brief of our opponents and we desire to make a short answer to some of their contentions, although it is somewhat difficult to discover from said brief what those contentions are.

On page 2 of the brief plaintiffs in error refer to the provisions of Act 223 of the Session Laws of 1917 amending Section 1323 (erroneously referred to as Section 1325) of the Revised Laws of Hawaii. It would have been fairer to have shown what the original law

was and *how* it was amended. The amendments simply fixed *new rates* of taxation, as already pointed out, and made no change in the substantive law. The entire discussion as to the amendment is misleading and raises a false issue.

In the citations on pages 10 and 11 of the brief, plaintiffs in error wholly lose sight of the real principle involved in this case. Undoubtedly, where specific bequests are made in trust, it is generally the beneficiary and not the trustee that pays the tax, but even in such a case, if the will clearly indicates that the legacy is to be free from the tax (as the instant will clearly does in regard to Harold Castle's indeterminate and indefinite annuity), no tax is payable by the legatee.

37 Cyc., 1577, and cases there cited.

In the case at bar, however, the *real* residuary legatees are the trustees themselves, just as H. M. von Holt was the residuary legatee in the case of *Estate of Brown,* supra. They are given almost absolute discretion as to how much they will pay to the widow, the son, the fund for immigrants and the boarding school and it is impossible to properly apportion the taxes and do justice, for we must look to the situation created *by the will* and not the situation actually brought about by the election of the widow to take dower, the acceleration of the son's interest and the determination and capitalization of that interest. The facts in the cases cited are wholly different from the facts in the case at bar. Appellants' real point in this connection is that the prior decision of the Hawaiian Supreme Court in *Estate of Brown,* supra, is wrong, but we do not believe that this court will so hold.

Plaintiffs in error say that they have found no case holding that trustees are successors to legacies under tax laws. Nor is there any such holding in the case at bar. The holding simply is that the trustees must *pay* the inheritance tax "out of the corpus of the estate" (Record, p. 37). Moreover, no such will as the present was involved in the cases cited by plaintiffs in error and those cases are of no importance. "Authorities, unless it appears that the cases decided were under similar statutory and testamentary provisions, are of no assistance here" *(Estate of Brown,* 24 Haw. at p. 446).

The citation from *Estate of Dillingham,* 25 Haw. 129, is in no way in point and needs no comment. In that case the testator's residuary estate was bequeathed equally to his four children and no trust of any kind was involved (25 Haw. at page 131). The legatees therefore had, of course, to pay the territorial inheritance tax on their interests.

Plaintiffs in error seem to have some complaint (just *what* is not clear) as to the *rate* at which the tax was levied, but we are not interested in this point. If the court holds that a different and lower rate should be paid on the annuity of Harold Castle than on the balance of the estate, we have no objection whatever. *Our* point is that the tax is payable out of the corpus of the estate and is not to be deducted from Harold Castle's indeterminate annuity. As to this last question the trustees have no interest whatever, as has already been shown, and their writ of error (as regards Harold Castle) should be dismissed on this ground alone.

Plaintiffs in error admit that the decision of a territorial court construing a local statute should not be disturbed unless there is "manifest error" (Brief, p. 14). Their further conclusion that there *was* "manifest error" in this case is wholly unsound. The most that could possibly be said is that the subject is not wholly free from doubt and, in view of the *prior* decision in *Estate of Brown,* supra, we do not think that this court will be disposed, under *any* circumstances, to reverse the present decision.

We find it very difficult to discover whether plaintiffs in error really contend that Harold Castle should pay any tax or whether they merely complain of the rate of the tax. As, however, they have no interest in the former subject, we will not pursue the matter further, except to say that they should not be given something they do not specifically ask for.

Plaintiffs in error see fit to discuss the question whether the charitable trust is a valid one. If it is not valid, the entire estate would go to Harold Castle. We wish to make it entirely clear, however, that Harold Castle in no way attacks this trust and that he fully respects his father's wishes in this regard. He seeks nothing that is not fairly and honorably his, but he does object to paying money which his father plainly intended that he should not pay.

Dated, May 1, 1922.

Respectfully submitted,

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